

FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C. 20554

JUN 24 2002

Claudette

OFFICE OF  
MANAGING DIRECTOR

Dennis J. Kelly, Esq.  
Law Office of Dennis J. Kelly  
Post Office Box 6648  
Annapolis, Maryland 21401

Re: Late Charge Penalty for  
Regulatory Fees for FY 1998  
00000RROG-02-016

Dear Mr. Kelly:

This letter grants your request, filed on behalf of Brazos Broadcasting Company (Brazos), concerning imposition of the penalty for late payment of regulatory fees for Fiscal Year (FY) 1998.

In a previous letter dated January 4, 2002 (Fee Control No. 00000CDMC-99-005 & RROG-01-002), we denied Brazos's petition for reconsideration of the letter ruling rejecting its objection to the 25 percent late charge in the amount of \$810.75. We did so because it appeared that Brazos had failed to establish that it met its obligation to ensure that the Commission receives full and proper payment no later than the final date on which regulatory fees are due for the year. On February 1, 2002, Brazos filed an application for review with the Commission, in which Brazos argued, *inter alia*, that it made a good faith effort to timely pay the fee.

We have re-examined this matter and on further review it appears that in connection with the collection of FY 1998 regulatory fees there was some ambiguity concerning the Commission's policies for implementation of the provisions of Section 9 of the Act, 47 U.S.C. § 159(c)(1), requiring the assessment of a 25 percent penalty for late payment. We therefore find good cause to grant your request that the late payment penalty not be imposed.

If you have any questions concerning this letter, please contact the Revenue and Receivable Operation Group at (202) 418-1995.

Sincerely,



Mark A. Reger  
Chief Financial Officer

*Law Office of*  
**DENNIS J. KELLY**  
*Post Office Box 41177*  
*Washington, DC 20018*

MEMBER, DISTRICT OF COLUMBIA BAR ONLY;  
PRACTICE LIMITED TO FEDERAL COURTS AND AGENCIES

TELEPHONE: 888-322-5291  
202-293-2300

TELECOPIER: 410-626-1794  
E-MAIL: dkellyfcclaw1@comcast.net

May 6, 2002

**RECEIVED**

**MAY - 6 2002**

Office of the Secretary  
Federal Communications Commission  
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Attention: John I. Riffer, Esquire  
Office of the General Counsel

**RE: Brazos Broadcasting Company**  
**Fee Control No. 00000CDMC-99-005 &**  
**RROG-01-002**

Ladies and Gentlemen:

In response to a telephone conference with Mr. John I. Riffer of the Office of General Counsel, the undersigned hereby seeks to withdraw the pending "Application for Review" in the above-referenced matter filed on February 1, 2002, on the understanding that the "late fee" penalty against Brazos Broadcasting Company will no longer be sought by the Commission.

Should additional information be desired in connection with the above matter, kindly communicate with this office.

Very truly yours,



Dennis J. Kelly

00000RROG-02-016 ORIGINAL

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FCC

BEFORE THE  
**Federal Communications Commission**  
2002 FEB 11 P 1:28 WASHINGTON, D. C. 20554

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FEB - 1 2002

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

ACCOUNT PROCESSING  
CNCW-1/7/02/THT

In re

BRAZOS BROADCASTING COMPANY

For Waiver of Late Charge

Penalty for FY 1998 Regulatory Fees

) Fee Control No.

) 00000CDMC-99-005 &

) RROG-01-002

TO: The Commission

**APPLICATION FOR REVIEW**

Brazos Broadcasting Company (Brazos), by its attorney, and pursuant to Section 1.115 of the Commission's Rules, hereby respectfully submits its Application for Review of of the January 4, 2002 letter of Mark A. Reger, Chief Financial Officer, Office of Managing Director, denying our timely "Petition for Reconsideration" of Mr. Reger's letter ruling dated October 26, 2000, denying Brazos' request for a waiver of the "late charge penalty for late payment of the Fiscal Year (FY) 1998 regulatory fees". In support whereof, the following is shown:

**Questions for Review**

1. The following are the questions for review:

- (1) Whether an innocent mistake on an otherwise timely filed regulatory fee submission should subject the payer to the imposition of a "late fee"?

- (2) Whether the imposition by the Commission of a "late fee" on a regulatory fee is constitutional, inasmuch as the late fee differs from payer to payer, depending on the underlying regulatory fee?

### **Basis for Review**

2. As required by Section 1.115(b) of the Commission's Rules, the following are the basis for review of each of the questions stated above. As to question (1), the action involves a question of law or policy which has not previously been resolved by the Commission (facts are believed to be *sui generis*), and, alternatively, the action involves application of a precedent or policy which should be overturned or revised. As to question (2), the action taken to delegated authority is in conflict with the Constitution of the United States.

### **Question 1: Fairness of Late Penalty**

3. As noted below, the imposition of this late fee is unfair, as the situation could have been remedied by a simple contact by the Managing Director's office to the undersigned—a contact required by Section 1.12 of the Commission's Rules. Because the Commission failed to follow its own rules, it is blatantly unfair for it to impose a penalty of \$810.75 on Brazos<sup>1</sup>.

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<sup>1</sup>Brazos is no longer the licensee of KBTX-TV. The station was sold by Brazos to KWTX-KBTX License Corp. in a transaction consummated on October 1, 1999.

4. Brazos' communications counsel, the undersigned, submitted a check made payable to Dennis J. Kelly, not to the Federal Communications Commission, along with Form 159 on the date that FY 1998 regulatory fees were due. This was a mere oversight and innocent mistake which did not evince a contempt for the due date in question. Had the Commission's staff contacted the undersigned, as Section 1.12 of the Rules suggests the staff had an obligation to do, the undersigned could have quickly come to the Commission's office, endorsed the check to the FCC, and the matter could have been resolved. Instead, the Commission seeks to assess a \$810.75 penalty, which under any norm of equity or decency it is not entitled to have. The Commission's action in this regard makes it look avaricious and small, rather than high-minded and noble, as it ought to look.

5. The question is then whether the Commission ought to mechanically and heartlessly impose a "late fee" on a situation where there was a good faith effort to pay the fee in question, the fee submission was made in a timely manner, and a simple phone call to communications counsel (which would have prejudiced no one and not unduly delayed the processing of the regulatory fees) would have rectified the matter, without the need for the "cutting" of a new check. The public interest, convenience and necessity would

certainly suggest that, under such circumstances, the "late fee" should not have been imposed.

**Question 2: Constitutionality of Late Fee**

6. Furthermore, the imposition of this "late fee" penalty, as well as the entire regulatory fee scheme, raises constitutional questions. The regulatory fee qualifies variously as a tax, an impost, a duty and/or an excise, nothing more and nothing less; the "fee" is levied on all broadcast licensees, whether or not they require any "service" from the Commission or whether or not the Commission engages in any "investigation" of the individual licensee. Article I, Section 8, clause 1 of the federal Constitution requires that "all Duties, Imposts and Excises shall be uniform throughout the United States". If there is anything about the regulatory fee scheme that is prominent, it is that it is not "uniform". For example, the dollar amount of the late fee is not uniform, but varies from case to case. A licensee in the New York metropolitan area pays a different rate from a licensee in rural east Texas.

7. Additionally, Article I, Section 7, clause 1 requires that "all Bills for raising Revenues shall originate in the House of Representatives". The FY 1998 regulatory fee scheme, a revenue raising program for the federal government, was adopted by the FCC. Therefore, the constitutionality of the FY 1998 regulatory fee scheme is in

grave doubt, because it did not originate in the House of Representatives, but rather originated by a Commission notice and comment rulemaking proceeding.

8. The case cited by Mr. Reger in defense of his position, *United States v. Munoz-Flores*, 495 U.S. 385, 109 L. Ed. 2d 384 (1990), dealt with the constitutionality of the collection from a convicted criminal of a "special assessment" to the Crime Victims Fund established by the Victims of Crime Act of 1984, 18 U.S.C. §3013. There is no case in which the constitutionality of the Commission's regulatory fee scheme, 47 U.S.C. §159, has been tested.

9. 47 U.S.C. §159 is not "a statute that creates a particular program and that raises revenue to support that program", because the Commission had been created some sixty years before its enactment. Rather, it raises revenue to support the government generally; and it is couched in terms to cover the annual Congressional appropriation for the Commission, without regard to specific programs that benefit specific licensees of the agency. It is a tax on those who hold broadcast and other Commission licenses, nothing more and nothing less—it is not a program like the "Crime Victims Fund", which the Supreme Court found was constitutional.

10. Therefore, we ask the Commission to review whether 47 U.S.C. §159 is constitutional. Our research indicates that this question has not been litigated in the courts, and

thus it is a question of substantial public importance. Further, a 25% penalty, rather than a late fee which addresses the circumstances of particular cases, seems to us to be violative of the Equal Protection clause of Amendment 5 to the federal Constitution.

**Requested Relief**


11. For the foregoing reasons, Brazos urges the Commission to forgive the 25 percent penalty (or \$810.25) it has sought to assess against Brazos.

WHEREFORE, it is urged that this Petition for Reconsideration BE GRANTED.

Respectfully submitted,

**BRAZOS BROADCASTING COMPANY**

By

  
Dennis J. Kelly  
(D. C. Bar #292631)  
Its Attorney

LAW OFFICE OF DENNIS J. KELLY  
Post Office Box 6648  
Annapolis, MD 21401  
Telephone: 888-322-5291

February 1, 2002



FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C. 20554

OCT 26 2000

OFFICE OF  
MANAGING DIRECTOR

Mr. Dennis J. Kelly  
Post Office Box 6648  
Annapolis, MD 21401

RE: Request for Waiver of Late Charge  
Penalty for FY 1998 Regulatory Fees  
Brazos Broadcasting Company  
Fee Control No. 00000CDMC-99-005

Dear Mr. Kelly:

This is in response to your request for waiver of the late charge penalty for late payment of the Fiscal Year (FY) 1998 regulatory fees, filed on behalf of Brazos Broadcasting Company (Brazos).

You state that on September 18, 1998, the due date for payment of FY 1998 regulatory fees, you submitted a check from Brazos that, by inadvertent mistake, was made payable to yourself, rather than to the Federal Communications Commission. You further state that the Commission notified Brazos of the mistake directly, rather than yourself, despite section 1.12 of the Commission's rules and resulting in a needlessly longer period of time to correct the mistake. Under these circumstances, you maintain, a 25 percent late penalty is "harsh and unfair."

We have fully considered all of your contentions. The Communications Act of 1934, as amended, requires the Commission to assess a late charge penalty of 25 percent on any regulatory fee not paid in a timely manner. It is the obligation of the licensees responsible for regulatory fee payments to ensure that the Commission receives the fee payment no later than the final date on which regulatory fees are due for the year. Your request does not indicate or substantiate that Brazos Broadcasting Company met this obligation. In this regard, we note that even if the Commission had notified you of the mistake directly, the payment would have been late. Therefore, the penalty was properly imposed and your request is denied.

Payment of the late charge penalty in the amount of \$810.75 was assessed and due on September 19, 1998. The late charge penalty must be filed together with a Form FCC 159 (copy enclosed) within 30 days from the date of this letter. You are cautioned that the failure to submit payment as required may result in further sanctions and the initiating of a proceeding to recover the penalty and accrued interest pursuant to the provisions of the Debt Collection Improvement Act. of 1996.

Mr. Dennis J. Kelly

2.

If you have any questions concerning this letter, please call the Credit & Debt Management Group at (202) 418-1995.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark A. Reger", with a stylized flourish at the end.

Mark A. Reger  
Chief Financial Officer

00000 RROG-01-002

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BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, D. C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

ADDRESSING  
In re

BRAZOS BROADCASTING COMPANY

For Waiver of Late Charge  
Penalty for FY 1998 Regulatory Fees

)  
)  
)  
) Fee Control No.  
) 00000CDMC-99-005  
)

TO: Office of Managing Director

PETITION FOR RECONSIDERATION

Brazos Broadcasting Company (Brazos), by its attorney, and pursuant to Section 1.106 of the Commission's Rules, hereby respectfully submits its Petition for Reconsideration of the letter of Mark A. Reger, Chief Financial Officer, Office of Managing Director, dated October 26, 2000 (see attached), denying Brazos' request for a wavier of the "late charge penalty for late payment of the Fiscal Year (FY) 1998 regulatory fees". As noted below, the imposition of this late fee is unfair, as the situation could have been remedied by a simple contact by the Managing Director's office to the undersigned—a contact required by Section 1.12 of the Commission's Rules. Because the Commission failed to follow its own rules, it is blatantly unfair for it to impose a penalty of \$810.75 on Brazos. In support whereof, the following is shown:

1. At the outset, it should be pointed out that Brazos is no longer the licensee of KBTX-TV. The station was sold by Brazos to KWTX-KBTX License Corp. in a transaction consummated on October 1, 1999.

2. While Mr. Reger's October 26, 2000 letter states that "we have fully considered all of your contentions", the letter appears to proceed under the presumption that we did not submit our regulatory fee submission to Pittsburgh on or before the due date. The fact of the matter is, we did.

3. The only problem was that we submitted a check made payable to Dennis J. Kelly, not to the Federal Communications Commission-a mere oversight and innocent mistake which did not evince a contempt for the due date in question. Had the Commission's staff contacted the undersigned, as Section 1.12 of the Rules suggests the staff had an obligation to do, the undersigned could have quickly come to the Commission's office, endorsed the check to the FCC, and the matter could have been resolved. Instead, the Commission seeks to assess a \$810.75 penalty, which under any norm of equity or decency it is not entitled to have.

4. Furthermore, the imposition of this penalty, as well as the entire regulatory fee scheme, raises constitutional questions. The regulatory fee qualifies variously as a tax, an impost, a duty and/or an excise, nothing more and nothing less. Article I, Section 8, clause

1 of the federal Constitution requires that "all Duties, Imposts and Excises shall be uniform throughout the United States". If there is anything about the regulatory fee scheme that is prominent, it is that it is not "uniform". For example, the dollar amount of the late fee is not uniform, but varies from case to case. A licensee in the New York metropolitan area pays a different rate from a licensee in rural east Texas.

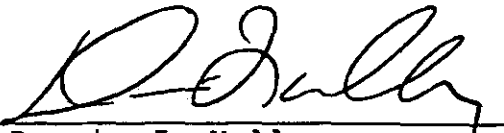
5. Additionally, Article I, Section 7, clause 1 requires that "all Bills for raising Revenues shall originate in the House of Representatives". The FY 1998 regulatory fee scheme, a revenue raising program for the federal government, was adopted by the FCC. Therefore, the constitutionality of the FY 1998 regulatory fee scheme is in grave doubt.

6. For the foregoing reasons, Brazos urges the Office of Managing Director to forgive the 25 percent penalty it has sought to assess against Brazos.

WHEREFORE, it is urged that this Petition for Reconsideration BE GRANTED.

Respectfully submitted,

BRAZOS BROADCASTING COMPANY

By   
Dennis J. Kelly  
(D. C. Bar #292631)  
His Attorney

LAW OFFICE OF DENNIS J. KELLY  
Post Office Box 6648  
Annapolis, MD 21401  
Telephone: 888-322-5291

November 27, 2000



Federal Communications Commission  
Washington, D.C. 20554

January 4, 2002

Dennis J. Kelly, Esq.  
Law Office of Dennis J. Kelly  
P.O. Box 6648  
Annapolis, MD 21401

RE: Request for Waiver of Late Charge Penalty for  
Regulatory Fees for FY 1998  
Brazos Broadcasting Company  
Fee Control No. 00000 CDMC-99-005 &  
RROG-01-002

Dear Mr. Kelly:

This is in response to the Petition for Reconsideration, filed on behalf of Brazos Broadcasting Company (Brazos), of the decision of the Managing Director, by letter of Mark A. Reger, Chief Financial Officer, dated October 26, 2000, denying your request, filed on behalf of Brazos, for waiver of the late charge penalty for late payment of regulatory fees for Fiscal Year (FY) 1998.

You originally requested a waiver of the late charge penalty for late payment of FY 1998 regulatory fees on the grounds that Brazos' failure to submit timely payment was due to the inadvertent mistake of submitting a check made payable to you, its attorney. You further argued that the Commission increased the amount of time necessary to correct the mistake by notifying Brazos rather than you of the error and that thus it was unfair to require payment of the late charge penalty.

As noted above, the Commission denied your request by letter dated October 26, 2000. The letter stated that your contentions had been considered but that you had not indicated nor substantiated that Brazos had met its obligations to ensure that the Commission received its fee payment no later than the last date on which regulatory fees were due for FY 1998. The letter also noted that, as the incorrectly drafted check was submitted on September 18, 1998, the last date on which regulatory fees were due for FY 1998, any subsequent corrected payment could not have been filed timely, whether you or Brazos were notified of the error.

In your request for reconsideration, you argue that assessment of the late charge penalty is unfair because "the situation could have been remedied by a simple contact by the Managing Director's office to [you] - a contact required by Section 1.12 of the Commission's Rules." You further state that, if you have been notified on September 30, 1998, rather than Brazos, you would have come to the Commission's office to endorse the check received by Mellon Bank in Pittsburgh, Pennsylvania. Without addressing whether Section 1.12 would extend to the filing of a licensee's regulatory fee by an attorney, we note that the Office of Managing Director addressed

this argument in denying your request. As stated in the October 26, 2000 letter, the original regulatory fee submission of the incorrectly drafted check was not made until the last date on which FY 1998 regulatory fees were due and therefore any subsequent corrected payment still would have incurred the late charge penalty.

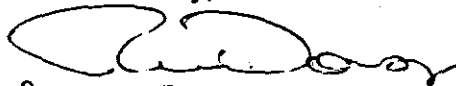
You further argue that the late charge penalty is invalid because it should be considered a duty, impost, or excise under the Constitution and it does not meet the Constitutional requirements that duties, imposts, and excises be uniform. In fact, the late charge penalty as set by Congress is uniform: the Commission is to assess an additional charge of 25% of the amount of any regulatory fee not paid in a timely manner. 47 U.S.C. § 159(c)(1).

You finally argue that the constitutionality of the regulatory fee scheme is in doubt because it raises revenue for the federal government, but was adopted by the Commission. You note that the Origination Clause of the Constitution requires that "[a]ll Bills for raising Revenue shall originate in the House of Representatives." U.S. Const., art. I, §7, cl.1. The Commission's regulatory fee requirement implements Section 9 of the Communications Act of 1934, as amended. Section 9 provides that the Commission shall assess and collect regulatory fees to recover the costs of specific regulatory activities of the Commission. 47 U.S.C. § 159(a)(1). A statute that provides for monetary assessments to fund a particular governmental program, as does Section 9, "is not a 'Bill for raising Revenue' within the meaning of the Origination Clause." *United States v. Munoz-Flores*, 495 U.S. 385, 398 (1990); *see also Sperry Corp. v. United States*, 925 F.2d 399 (Fed.Cir. 1991) (upholding statutory fee assessment and finding *Munoz-Flores* Origination Clause analysis applies in case where Congress establishes assessment obligation after the creation of the governmental program).

After careful review of the issues raised in your request for reconsideration, we do not find any basis for modifying the decision denying the request for waiver of the late charge penalty. Payment of the late charge penalty in the amount of \$810.75 was assessed and due on September 19, 1998. The late charge penalty must be filed together with a Form FCC 159 (copy enclosed) within 30 days from the date of this letter. You are cautioned that the failure to submit payment as required may result in further sanctions, including the initiation of a proceeding to recover the penalty and accrued interest pursuant to the provisions of the Debt Collection Improvement Act of 1996.

If you have any questions concerning this letter, please call the Revenue & Receivables Operations Group at 418-1995.

Sincerely,



for Mark Reger  
Chief Financial Officer